IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

: O R D E R :

Arun Choudhary Vs. Union of India & Another.
(S.B. Civil Writ Petition No.230/1994.)

DATE OF ORDER : December 8th, 2007

P R E S E N T

Hon'ble Mr. Justice Gopal Krishan Vyas

Mr. V.N. Kalla for the petitioner.
Mr. Vineet Kumar Mathur for the U.O.I.

BY THE COURT :

By way of filing this writ petition, the petitioner is challenging order Annex.-5 dated 03.08.1993 whereby two punishments have been imposed upon him – firstly, the petitioner is awarded 4 months' civil imprisonment and, secondly, he has been dismissed from service.

According to the facts of the case, the petitioner was initially enrolled on 19.02.1984 at BRO Siliguri having been appointed Gunner in the Unit 2222/222 Med. Regiment and since

then he was working under the control of the respondents. While the petitioner was so posted at Bikaner, after obtaining sanctioned leave for the period commencing from 24.01.1993 to 28.03.1993, the petitioner left for his village Khagria (Durgapur, Bihar). At his village, due to murder of his brother Udai Singh Choudhary, the petitioner sent a telegram on 22.03.1993 for extension of leave. However, on 31.03.1993, the Adjutant 222 Med Regiment, Major Officer Commanding S.P. Singh sent a letter to the District Collector, Khagaria (Bihar) for apprehending the petitioner who was, according to the said letter, absent without leave since 28th March, 1993. Thereafter, vide Annex.-4 a charge-sheet was served upon the petitioner in which a charge was levelled against him that without sufficient cause he remained over-staying beyond 28.03.1993 and thus remained absent without sanction of leave for 69 days. In pursuance of the charge-sheet so served upon the petitioner, summary court-martial proceedings was taken up against the petitioner and, as noted hereinabove, ultimately the petitioner was dismissed from service with civil imprisonment for 4 months.

It is vehemently contended by learned counsel for the petitioner that the whole court-martial proceedings against the petitioner was illegal because the respondents were under

obligation to comply with Section 130 of the Army Act and provisions of Rule 115(2) of the Army Rules of 1954. It is contended by learned counsel for the petitioner that while holding the court-martial proceedings against the petitioner provisions of Section 120(2) of the Army Act were completely ignored and, therefore, the whole proceedings is vitiated and deserves to be quashed. It is argued on behalf of the petitioner that plea of guilty was illegally recorded in contravention of Rule 115(2) of the Rules of 1954, therefore, the finding of guilt holding the petitioner guilty for over-staying upto 69 days is perverse and illegal.

It is urged by learned counsel for the petitioner that the petitioner overstayed after sanctioned leave for a reason beyond his control which was disclosed by him and extension of leave was also sought through telegram but the same was not granted; and, in the court-martial proceedings, the respondents have erred while recording plea of the petitioner for committing the guilt. According to learned counsel for the petitioner, the procedure for taking down summary evidence was also not followed which is provided under Rule 23 of the Rules of 1954. Learned counsel for the petitioner invited attention of the Court towards the judgment of the Division Bench of this Court in the

case of Union of India Vs. Manoharlal Pareek, reported in 2007 WLC Raj. 601. Learned counsel for the petitioner has also relied upon the judgment of the apex Court reported in AIR 1994 SC 215 and AIR 2007 SCW 4111. Drawing support from these judgments, learned counsel for the petitioner prayed that imposition of two punishments as a consequence of the so-called court-martial proceedings is illegal and perverse because, obviously, the petitioner over-stayed after the sanctioned leave for cogent reasons and the respondents ought to have considered the same but only on the basis of accepting the plea of guilty, though recorded in contravention of Section 115 (2) of the Army Act, the petitioner has been penalized. It is emphatically urged that it is now settled law that a person merely be joining the armed forces does not cease to be a citizen and therefore cannot be deprived of his human or constitutional rights. This aspect of the matter has been considered by a Division Bench of the Delhi High Court in Nirmal Lakra Vs. Union of India & Others, reported in 2003 (1) SLJ 151. While referring to the judgment of the apex Court in Sheel Kr. Roy Vs. Secretary M/O Defence & Others, reported in 2007 AIR SCW 4111, it is vehemently argued by learned counsel for the petitioner that when it is evident that arbitrariness of the commanding officer in

holding the petitioner guilty and awarding punishment upon him is apparent on the face of the record, the impugned order must be held to be wholly unsustainable.

On the other hand, learned counsel for the respondents contended that the impugned order has been passed for the reason that the petitioner remained absent after expiry of sanctioned leave. It is also argued that though he applied for extension of leave but the same was not granted, therefore, the respondents have rightly held the petitioner guilty and awarded the punishment. It is urged by learned counsel for the respondents that high devotion to the duty was expected of the petitioner while he was serving in the defence service but he grossly misconducted and accordingly he was awarded the punishment as a sequel to the court-martial proceedings.

It is further argued by learned counsel for the respondents that the writ petition deserves to be dismissed on the ground of delay and laches also because the petitioner was sent to jail to suffer imprisonment on 02.08.1993 and he could have filed the writ petition earlier but he has filed this petition after inordinate delay.

In support of the finding of the court-martial, it is contended by learned counsel for the respondents that the

proceedings of court-martial was conducted in consonance with the provisions of the Army Act, 1950 and the Rules of 1954. With regard to contravention of Section 115(2) it is submitted that the petitioner pleaded guilty and his plea of guilty was accordingly recorded and as such no illegality was committed by the respondents. Learned counsel for the respondents invited attention of the Court towards judgments reported in AIR 2001 SC 3053 (Union of India & Others Vs. R.K. Sharma), AIR 1998 SC 577 (Union of India Vs. Major A. Hussain), 2005 (7) SCC 597 as well as 2006 (7) SCC 212. Lastly, learned counsel for the respondents also relied upon order dated 10.08.1994 passed by the Gujarat High Court in Special Civil Appln. No.2973 of 1993.

In this case, it is not in dispute that while availing sanctioned leave with effect from 24.01.1993 upto 28.03.1993, the petitioner sent application for extension of leave by 20 days which was not extended. It is also undisputed fact in this case that in the court-martial proceedings it was evidently clear that the petitioner had shown the reasons for his over-staying beyond the sanctioned leave and he had voluntarily rejoined before the date on which the charge-sheet was issued to the petitioner in which the charge was framed as follows :

"CHARGE SHEET

The accused No.14493145Y Gnr (General Duty) Arun Choudhury of 222 Medium Regiment is charged with :-

Army Act sEC 39(B)	WITHOUT SUFFICIENT CAUSE OVER STAYING LEAVE

in that he,

at Bikaner on 29 Mar 93 having been gtd leave of absence from 24 Jan 93 to 28 Mar 93 to proceed to his home, failed to rejoin the duty on expiry of the said lve, until he rejoined voluntarily at about 1900h on 05 Jun 93.

(Total period of absence 69 days)"

The petitioner was directed to file his reply and the next date was fixed on 02.08.1993. On that date, the plea of the petitioner was recorded by the respondents which is evident from Annex.-R/1. Vide Annex.-R/1, when a question was put to the petitioner by the court-martial whether he was guilty or not, the answer of the petitioner to the question is recorded "Yes, I am guilty." Thereafter, a certificate was also given by the Col. Commanding Officer for recording summary of evidence in which it is observed as follows :

> "Before recording plea of guilty effered by the accused No.14493145Y Gnr (GD) Arun choudhary of 222 Medium Regiment, the court explained to the accused the hearing of charge to which he had pleaded guilty and ascertained that the accused understood the nature of the charge to which he

> has pleaded guilty. The court also informed the accused the general effect of the plea of guilty and the difference in procedure which will be followed consequent to the same plea. The court having satisfied itself that the accused understands the charges and the effect of his plea of guilty, accepts and records the same. The provision of Army Rule 115(2) are complied with."

Bare perusal of the above certificate manifestly shows that it is nowhere mentioned in the certificate that the general effect of the plea of guilty was informed to the petitioner. In my opinion, the petitioner was to be informed that in the event he pleaded guilty he would be sent to civil imprisonment and his services would be severed by dismissal from service. Therefore, according to the language of Section 115 (2) of the Army Act, it was the duty of Col. Commanding Officer, who recorded the plea of guilty made by the petitioner, to inform the petitioner with regard to the effect of the plea so recorded.

It is not disputed by the respondents that telegram was sent by the petitioner for extension of leave in which the reason for extension of leave period was mentioned as due to murder of his brother. In the reply to para 3 of the writ petition, it is specifically mentioned by the respondents that the facts are not disputed; meaning thereby, it was informed by the petitioner that the reason for seeking extension of leave was murder of his brother. However, the same was not considered by the

respondents and straight away the petitioner's application for extension of leave period was rejected. It is obvious that non-consideration of the reason for over-staying or extension of leave period was arbitrarily not accepted by the respondents. The Commanding Officer has apparently failed to comply with the provisions of Section 115(2) of the Army Act in right perspective. Had the general effect of the plea of guilty been informed to the petitioner, it was to be certified by the Commanding Officer as to what kind of general effect was informed while recording the petitioner's plea of guilty.

In the facts and circumstances of the case, while it is admitted position that the petitioner had sought extension of the leave period owing to murder of his brother, it is ununderstandable that any sound-minded person can accept the plea of guilty. It is not disputed that in the application for extension of leave the petitioner informed that due to murder of his brother he was seeking extension of leave. Not only the the application for extension of leave was rejected the charge for wilful absence from duty was levelled against the petitioner. In my opinion, without recording the import of plea of guilty in the certificate, the plea of guilty was recorded in total contravention of Section 115(2) of the Army Act. It may also be observed

that the respondents have nowhere stated that the petitioner's brother was not murdered nor any enquiry with regard to this fact was conducted. It is also not denied that the application for extension of leave period was sent by the petitioner prior to 28.03.1993.

It is also very important aspect of the matter that no human mind can plead guilty if the effect of conviction and dismissal from service is brought to the notice of the delinquent who has earlier pressed his explanation that he over-stayed beyond the sanctioned leave due to murder of his brother, therefore, the respondents contention with regard to informing the general effect of the plea of guilty has no force of law because it is not possible for human prudence to plead guilty despite having already explained the reason for dereliction. Therefore, in the facts and circumstances, there is gross arbitrariness on the part of the Col. Commanding Officer who has recorded the plea.

A word may also be said that even in the court-martial proceedings application of mind to the facts and circumstances of the case is warranted and, therefore, it cannot be said that in view of the dominant importance of adherence to disciplinary norms in an armed force, the humane approach is relegated to

oblivion for any consideration. Lack of fair play and reasonableness renders the conclusion of a court of enquiry arbitrary and, therefore, the punishment inflicted as a sequel to the court-martial proceedings cannot be sustained in the eye of law. A sufficient cause was informed by the petitioner while seeking extension of leave which fact goes a long way to mitigate the circumstance of over-staying the leave. Therefore, in my considered opinion, the impugned order is passed in consequence of a perverse finding and deserves to be set aside.

However, it does not rest with aforesaid observation because admittedly the petitioner is member of an armed force. The facts are also obvious. The record reveals that the petitioner has derelicted in his conduct while discharging duties in the Indian Army and, even after 20 days for which he sought extension of leave, the petitioner remained absent for 49 days. Therefore, in the facts and circumstances of the case, the petitioner deserves to be penalized only for a proved misconduct with penalty commensurate to the gravity of the dereliction.

I have also perused the judgments cited by learned counsel for the respondents. In the facts and circumstances of the present case, they do not come to the aid of the respondents.

Consequently, the writ petition is allowed. Order impugned dated 03.08.1993 (Annex.-5) is quashed and set aside. The respondents are ordered to reinstate the petitioner in service with all consequential benefits. It is, however, left open to the respondent authorities to inflict penalty which may be lawfully commensurate to a proved misconduct of the petitioner. It is clarified that facts and circumstances of the case leave no manner of doubt that dismissal from service is disproportionately harsher.

(Gopal Krishan Vyas) J.